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ABSTRACT

This paper presents copyright concerns which affect resources and services in higher education. Topics include: (1) a brief overview of the history of copyright; (2) a discussion of copyright components, including fair use guidelines; (3) copyright in libraries, specifically as it relates to reserves and interlibrary loan; (4) copyright in digital environments, including nonprint works, the Internet, and distance learning; (5) formalities and definitions, including copyright notice/registration, duration of copyright, copyright ownership, and requesting permission from the copyright owner; and (6) liability. Contains a 38-item bibliography of print and electronic sources. (MES)

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Copyright in the Academic Environment: An Introduction

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ED 436 120

Abstract
Introduction
Background
Fair Use
Copyright in Libraries
Copyright in Digital Environments
Formalities and Definitions
Conclusion
References
Contacts

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Abstract

Copyright concerns, which affect resources and services in higher education, are presented. Topics include a brief overview of the history of copyright, a discussion of copyright components, copyright in the electronic age, and liability. Web sites addressing copyright are listed, and a bibliography of print and electronic sources is provided.

Introduction

Copyright is an issue of endless depth and complexity, particularly in academe. Yet, as educators and librarians we are required to have a basic understanding of its principles. We need to be aware of its implications for teaching and learning since we deal with ideas and information conveyed in copyrighted works on a daily basis. Moreover, understanding copyright in the electronic age, with new modes of communication and publication, poses additional and constantly evolving challenges. To what extent does the law enable teachers, students, and librarians to have access to information without infringing upon the rights of authors? How do we use protected materials in a fair way? As librarians, we cannot offer a comprehensive discussion of the topic but we can offer an introduction to the issues facing the academic environment. In the conclusion, we list sources for ready reference to facilitate an understanding of copyright law.

[Top]

IR 019 743

Background

Copyright is not a modern institution. The concept of copyright is over 400 years old. The protection of creative property had little impact early in history because copying was a labor-intensive, time-consuming,

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skilled craft that was expensive to produce. The arrival of the printing press changed the environment of copying and distribution. The emergence of this new technology made printing and copying fast, easy and inexpensive. But it also created an atmosphere of apprehension among copyright holders and copyright seekers. New issues arose and were brought to the forefront. It seems that technology has often been the impetus for taking a close look at current copyright laws. A brief look at the history of copyright law will give us a better understanding of our current laws.

The English Stationers' Company, a membership guild that published the works of their members, was granted a Royal Charter in 1557. The guild paid a lump sum to an author and the Stationers' Company held the copyright. This limited most publishing opportunities to the wealthy and upper class and eventually created an unacceptable situation. In 1710, the Statute of Anne was enforced, which allowed the author of the work copyright for 14 years and, if the author was still alive, it could be renewed for another 14 years. In the United States, the Statute of Anne was in effect until the drafting of the U.S. Constitution by the Federal Convention. The Convention deemed it wise to provide copyright protection stating that "the Congress shall have power...to promote the progress of science and useful arts...by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries." George Washington signed the first United States Statute in 1790, thereby establishing copyright and patent rights in America. This first statute was amended so frequently to include new formats, new technologies, art forms, and various creative efforts that it became cumbersome. Finally, in 1909, it was completely overhauled, prompting Mark Twain to observe, "Only one thing is impossible for God: to find any sense in any copyright law on this planet." The new statute included many new formats and established a term of copyright of 28 years plus a renewal of 28 years. The last revision, in 1976, included inclusive language that would not limit format or technology. This revision provided a term of copyright for the life of the copyright holder plus 50 years. In 1989, the United States joined the Berne Convention for international copyright protection.

Copyright law grants the copyright owner five exclusive rights, which are explained in more detail below: control of reproduction, preparation of derivative works, public performance, public distribution, and public display. But it also encourages the availability of copyrighted works to the public and facilitates their accessibility and use. Copyright protects intellectual property just as other laws protect real property. Since the United States joined the Berne Convention, it is no longer necessary to register or display copyright. Two things are necessary: the work must be original and must be in a fixed, tangible medium. Any work conforming to these two principles has the potential for copyright.

[Top]

Fair Use

Copyright provides exclusive use of original works by the copyright owner. Yet, exclusive use by the owner would not do much in fostering a scholarly environment, or the exchange of ideas. Therefore, the Fair Use Guidelines were implemented to establish a balance in the relationship between the rights of the copyright owner and the rights of the user of copyrighted works. Fair use assures learning is not impeded by copyright but still protects intellectual property. While fair use provides an avenue to photocopy copyrighted works for purposes of teaching, scholarship, or research, it does not allow the abuse of copyright under the guise of educational application. There are four factors that determine fair use as provided by the United States Code, and they are a package deal:

- The material must be used only for educational purposes without a hint of commercialism.
- The nature of the work must lend itself to photocopying a portion of the work.
- The amount copied should represent only a portion that does not impinge on the creative aspect of the work or portion copied.

- The quality and quantity of photocopying does not affect the potential value of the work.

The Fair Use Guidelines set the stage, but it was up to educators to apply them. Model guidelines are available from most professional groups involved in education: teachers, librarians, publishers, producers, and researchers. The common goal is to adhere to fair use and address the concepts of brevity, spontaneity, cumulative effect, and prohibitions as recommended in the Fair Use Guidelines. Brevity would cover a chapter of a book, an article in a journal, a poem, or a chart; it would not be more than approximately 10 percent of the whole. According to the Fair Use Guidelines, spontaneity allows the copying of material, which has just been found and is needed for effective teaching. Cumulative effect limits how much can be copied from one source or one author and curtails the number of copies and distribution of these copies. Each copy should contain a notice of copyright.

[Top]

Copyright in Libraries

Two areas of concern regarding copyright in libraries are reserves and interlibrary loan. Photocopied materials placed on reserves for student reading and requested for scholarly purposes through interlibrary loan must adhere to acceptable guidelines.

Reserves

Materials on reserves often are photocopies. The same photocopied materials should not be distributed every semester/lesson plan period. Each student and the teacher can expect to have a copy for their use and the material should contain a copyright notice and complete citation. The copy should be free of charge except for the cost of actual photocopying. When material is placed on reserve in the library, the amount of materials and the number of copies should be within reason and contain a notice of copyright. According to the guidelines, five copies of an article can be put on reserve and nine articles can be copied for one course. The need for photocopied material that exceeds fair use should be collected in a course pack after copyright clearance has been received. The photocopied reserves materials should not have a detrimental market impact. Generally it is best if the library owns a copy of the work. All requests should follow American Library Association guidelines or the guidelines established for the local campus. Electronic reserves should be approached only after careful planning and should follow Fair Use Guidelines and be password protected.

Interlibrary Loan

Interlibrary arrangements are covered in Section 108 of the Act. Interlibrary borrowing and lending operations are expanding for practical purposes, namely to continue serving patrons in the face of decreasing library budgets and dramatically increasing prices, particularly for serial subscriptions. Naturally, publishers, who are the copyright owners in most cases, have a vested interest in keeping the number of photocopies produced low and the number of subscriptions, in the case of serials, high. Therefore, "The need is for a copyright standard that permits customary interlibrary operations, but that signals a reasonable limit and indicates when a library should reinstate its own purchase of the original work... The challenge is to bring practical meaning to that ambiguous limit." Recommendations made by the National Commission on New Technological Uses of Copyrighted Works (CONTU), established by Congress, are generally adopted as guidelines by libraries.

According to the CONTU Guidelines, "systematic reproduction or distribution" of copies is prohibited. However, certain photocopying or reproduction of a work may be within the limits of fair use, specifically as long as the photocopying or reproduction falls under the "Rule of Five." This rule stipulates that during

one calendar year, no more than five articles, published within the last five years, may be copied or reproduced from one periodical title. Also, the requesting library must indicate on the request form compliance with the CONTU Guidelines and must maintain records of all requests for photocopies or phonorecords for three years after conclusion of the calendar year. While photocopies or reproductions from articles older than five years are not addressed in the Guidelines, they must not be considered available for unlimited use. Instead, copyright law is still applicable, particularly Sections 107 and 108.

[Top]

Copyright in Digital Environments

The issue of copyright in digital environments is probably the most challenging to librarians and educators alike. Technological developments force us to continuously re-examine and re-apply our understanding of the copyright statute to new formats of communication. The recent Digital Millennium Copyright Act (DCMA) was passed in order to bring copyright legislation into the digital age. The DCMA intends to bring U.S. copyright law into conformance with recent World Intellectual Property Organization (WIPO) treaties, asserting that copyright applies in digital environments just as it applies in print and audiovisual media.

Like the Copyright Act of 1976, the DCMA attempts to balance the right of the copyright owner with the right of the user of copyrighted works. Section 103 of the DMCA adds a new chapter (Chapter 12) to Title 17 of the U.S. Code. New Section 1201 stipulates that it is a violation of U.S. law to circumvent technological measures used by copyright owners to protect their work, as well as to remove any copyright information that copyright owners affix to a digital document. This prohibition is subject to various exceptions. Of interest to academicians is the exception, which "permits nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work." Also, the DMCA stipulates that nonprofit educational institutions have the right to copy and share digital documents for purposes of archiving and preservation, in accordance with Section 108.

Copyright in the following digital environments are discussed in more detail: nonprint works, the Internet, and distance learning.

Nonprint Works

Nonprint works include audiovisual and multimedia materials. Audiovisual materials are "non-book materials such as records, tapes, slides, film strips and videotapes." Multimedia materials, on the other hand, are "computer systems designed to capture, store, process, retrieve, display and play back multiple types of information: text, picture, sound, animation, and/or video. At least two of the components must be present to qualify as a multimedia product." Nonprint works are protected under the copyright law— the same rights apply. They may be duplicated in educational and library settings under copyright for specific reasons. A pictorial or graphic accompanying a textual work may be copied under the same circumstance as the textual part. All nonprint works may be copied for preservation or to replace damaged and deteriorating copies. Copying and distribution of nonprint works is governed by fair use.

According to the Fair Use Guidelines for nonprint works established by the Committee for Fair Use Guidelines for Educational Multimedia, educators and students may copy portions of copyrighted materials to be incorporated in their productions of classroom projects or classroom instruction. The portion of materials used from a single copyrighted work should not exceed 10 percent. It can be utilized for educational purposes for up to two years and is limited to the number of copies and their distribution. No more than three copies should be made; two for class use and one for preservation. Time, portion, copying

and distribution must always be considered when copying nonprint works. Credit should be given to the copyright owner. Before displaying copied nonprint materials, determine if the following requirements are met:

- Is the copy for a face-to-face educational activity?
- Is the copy being displayed in an educational facility?
- Does the copy adhere to the Fair Use Guidelines?

Internet

The Internet, for the purposes of this paper, is defined as the technology providing the means of transmitting digital formats. The current copyright act is "technology neutral" and, until revised, is the standard for using information transmitted through the Internet. Digitized materials are covered by the guidelines for fair use. The non-requirement to affix a copyright notice to an original work extends to works from all Internet services, including e-mail, gopher, telnet, or the World Wide Web. A common misconception is that material on the Internet is free when indeed material on the Internet must be considered copyrighted and not copied or distributed without permission. In the case of Webpages, in order to avoid copyright infringement, possibly the best practice may be to simply link to a Webpage. An Internet link generally conforms to copyright and fair use since it may be considered equivalent to a cross-reference. Academic institutions often gather material for campus use in this manner. Similarly, material accessed and downloaded or printed from electronic databases with Web-based interfaces are copyright protected. These databases are generally purchased through licensing agreements.

E-mail, another component of the Internet, must be viewed with the potential for copyright infringement. E-mail, regardless whether it is personal or from a discussion list, is often informative, creative and definitely in a fixed medium. Unless the material posted indicates permission for distribution, it is safe to assume it is copyrighted and should be handled in the proper manner. Therefore, these works should be distributed with the consent of the original author, or cited as a copyrighted work.

Computer software as well is copyrighted and usually licensed. Software companies are very clear regarding the copying and distribution of their materials. Generally, a copyright notice is displayed and restrictions, which accompany the copyright, are outlined. Unauthorized use and distribution is a violation of copyright and the license agreement and there is the chance of copyright infringement and liability. Software can include computer programs, databases, CD-ROMs, and electronic publishing.

Copyright infringements on the Internet should be approached much the same way as in the traditional environment. However, the recently enacted Digital Millennium Copyright Act gives the copyright owner the right to demand the Online Service Provider notify a copyright infringer to remove material from the Internet. The infringement must be removed within a given time or the online service can be denied.

Distance Learning

Section 110 of the Copyright Act of 1976 addresses the use of copyrighted works in distance learning instruction. Bielefeld and Cheeseman define distance learning as a situation where "one or more students who are not in the physical presence of the teacher receive instruction through some method of technology." The instruction can take place via different modes of technology, including passive video, audio and video conferencing, the broadcasting of picture and sound from one classroom to another via satellite transmission, or teacher-student interaction via the Internet.

Since modes of transmission of instructional materials in a distance learning situation differ from instruction in a traditional setting, not only the rights to use materials in a course must be acquired but also

the rights for transmitting the course via some type of network. The so-called "classroom exemption" (Section 110(1)), which applies in face-to-face instruction in a nonprofit educational setting, may no longer apply in a distance learning situation. For example, in a traditional, face-to-face instruction context, the law exempts a teacher from seeking copyright permission when displaying (e.g. showing a picture) or performing (e.g. playing a videotape) to a class of students—if the instruction takes place in a classroom (including closed-circuit on-campus networks). In this context, nearly all displays and performances are allowed. In the distance learning context, however, this changes. While the law allows the "transmission" of a performance or display, it restricts the type of work that can be performed or displayed to "a nondramatic literary or musical work." A literary work is any work other than audiovisual, meaning a motion picture, video, or computer screen display is excluded. A definition for "musical work" is not provided. For example, showing a videotape in a face-to-face classroom situation is perfectly legal. In a distance learning situation, however, the instructor has to seek permission from the copyright owner each time the videotape is shown.

While the law offers some guidance on the types of materials that may be used, or may not be used, in a distance learning situation, it remains unclear and legal opinion divided on many aspects. For example, is a remote site considered a classroom? Is face-to-face instruction to be taken literally? Further, in the future, distance learning courses may be received in a student's home. This, however, is not within the limits of the statute.

The delivery of educational courses via the Internet poses additional questions. For its versatility, allowing an instructor to use copyrighted works in different formats, including text, audiovisual, and software, the Internet has become a popular distance learning format. In order to deliver copyrighted works via the Internet, "the institution must restrict access to enrolled students." Further, the guidelines for classroom photocopying (see above) apply to the delivery of an article via the Internet, meaning that permission must be sought to distribute copyrighted works in excess of these guidelines. For inclusion of nonprint works on a course Web site, permission from the copyright owner must be obtained. However, inclusion of "short clips of these works on a protected web site may be a fair use because the copying is de minimis, but including larger portions is not likely fair use."

Until the Copyright Act is amended "to make it clear that distance learning is the modern equivalent of face-to-face instruction," it is better to be on the safe side and seek permissions. Bruwelheide recommends that "Developers may also need to acquire rights to create, reproduce, and distribute any derivative works that might result from the course. Distribution rights to send materials to distant learners may need to be obtained—prior to delivery. A course developer must think ahead about possible uses that will affect distribution, transmission, and taping."

Lastly, the aforementioned DMCA requires that the Copyright Office consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and thereafter report to Congress on "how to promote distance education through digital technologies." So look for changes to come.

[Top]

Formalities and Definitions

Copyright Notice and Registration

How to protect your work from infringement? As mentioned earlier, since the U.S. has joined the Berne Convention in 1989, registering the work with the U.S. Copyright Office and affixing a copyright notice are no longer required. Instead, a work is automatically copyrighted as long as it is an "original work of

authorship" and "fixed in any tangible medium of expression." Yet, it would be a mistake to overlook the benefits of copyright notice and registration for a work of authorship. Placing the copyright notice "©" on a work not only provides important information to the reader, such as who the owner of the copyright is, it also helps prevent infringers from claiming innocence. Registering the work with the U.S. Copyright Office also provides the author with other important legal benefits. For example, if a copyright owner's work is infringed before registration, the owner is entitled to remedies but cannot legally enforce his or her rights until the work is registered. "The copyright owner of a registered work may recover statutory damages as well as attorneys' fees if a case goes to court. Also, registration clearly advises the public of the copyright for a work. In most instances, registration is required prior to filing suit for infringement."

Duration of Copyright

Published works created on or after January 1, 1978 are currently protected for the life of the author plus fifty years. Anonymous and pseudonymous works, and works made for hire are protected for seventy-five years from their first publication, or 100 years from their creation, whichever term expires first. A work first published more than seventy-five years ago is generally considered to be in the public domain. For example, during 1998 materials first published before 1923 may safely be assumed to be in the public domain and therefore be copied and even republished without copyright permission. Works created by U.S. Government employees during their employment are in the public domain. This, however, is not the case for works created by state and local governments, which may claim copyright.

Similarly, unpublished works created on or after January 1, 1978 are protected for the life of the author plus fifty years. "Unpublished works might include diaries, letters, survey responses, manuscripts, photographs, art, or software – any type of work that has not been distributed to the public in copies." In the case of unpublished works created before January 1, 1978, however, the copyright will not expire before December 31, 2002. "Until then, the privileges of copyright and the limits of fair use apply to unpublished manuscripts, letters, and diaries of even America's leading historical figures."

Copyright Ownership

The person who does the creative work is considered the copyright owner, unless the "work is made for hire." In such cases, the employer rather than the creator is considered the author and copyright owner. Independent contractors are not considered employees and therefore likely retain copyright ownership.

Two or more authors of a creative work jointly hold copyright ownership. Joint copyright ownership allows each co-owner to use or license the entire work but requires them to account for all profits to the other co-owners. A co-owner acting alone cannot transfer the copyright to another party or grant an exclusive right to use the work without the consent of the other co-owners.

Copyright ownership comes with the following exclusive rights, granted by the Copyright Act, which last for a specified time period (see above):

- The right to reproduce or copy the work
- The right to prepare derivative works
- The right to distribute copies or phonorecords of the work to the public
- The right to publicly perform the work (in the case of an audiovisual work)
- The right to publicly display the work (in the case of a literary, musical, dramatic, or choreographic work, a pantomime, or a pictorial, graphic or sculptural work)

Requesting Permission from Copyright Owner

In order to use other people's copyrighted works, written permission must be obtained. First and foremost, the correct copyright owner must be identified, while keeping in mind that copyrights may be sold or given away. A permission letter should include a description of the material to be used and a detailed explanation of how it will be used. It should also include a place for the recipient to sign indicating that permission is granted. An affirmative response must be received, otherwise permission cannot be considered granted.

Liability

Chapter 5 of the Copyright Act deals with the remedies for infringement. Remedies afforded a copyright owner are injunction, impounding or destruction of the copies and the equipment used to produce the copies, and recovery of all costs, including attorney's fees. Monetary remedies may also be awarded. Knowingly infringing on the rights of the copyright owner in a manner not within fair use may result in legal action. If found guilty, penalties can range anywhere from $500 to $20,000 per work infringed upon and up to $100,000 for willful, or knowledgeable infringement. Damages for "innocent" infringement may be $200, or even remitted for employees of educational institutions. "The courts shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (I) an employee or agent of a nonprofit education institution, library, or archives acting within the scope of his or her employment... " In the case of willful infringement, the infringer may be criminally liable. In 1997, Congress amended the Copyright Act, adding tougher criminal liabilities for willful infringement, particularly in electronic media.

[Top]

Conclusion

In many ways, academe is defined by the conveyance of information from one party to others, with the university overseeing this transfer. The academic enterprise, therefore, is particularly vulnerable to copyright infringement, making awareness of copyright law vital for all educators and academic librarians alike. The Copyright Law is intended to balance the interests of copyright owners with the interests of the users of copyrighted material. The Fair Use Guidelines are particularly relevant for "nonprofit educational purposes." They assure the use of information for appropriate purposes, even without the permission of the copyright owner. This does not mean, however, that librarians and educators can violate copyright law. Rather, the following general guidelines must be considered before taking action: always apply the Fair Use Guidelines, always secure the copyright owner's permission when in doubt, and, if necessary, seek alternatives. In addition, consider seeking legal advice and document that you have done so. Check institution policies or guidelines on copyright. Always act in good faith and use common sense. In short, you protect yourself best by erring in favor of the copyright owner.

Changes in the information world continually challenge interpretations of copyright law. Therefore, we must stay current on legislation, particularly as formats for communication of ideas become more sophisticated. For a topic of endless depth such as copyright, there is an equally endless amount of information published. Following is an incomplete list of ready-reference sources.

[Top]

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[Top]

World Wide Web Sources

American Association of Law Libraries (AALL)

http://www.aallnet.org/committee/copyright/

American College and Research Libraries (ACRL): Copyright Committee

http://www.library.cmu.edu/Unofficial/ACRL

American Library Association (ALA): Position on Fair Use Guidelines in a Digital Information Environment

http://www.ala.org/washoff/alawon/alwn601.htm/

American Research Libraries (ARL) Office of Scholarly Communication

http://arl.cni.org/scomm/

Association of American Publishers (AAP)

http://www.publishers.org/home/

Copyright Clearance Center, Inc.

http://www.copyright.com

The Copyright Website

http://www.benedict.com

Cornell University Law School, Legal Information Institute

http://www.law.cornell.edu

FindLaw

http://www.findlaw.com

Franklin Pierce Law Center: Intellectual Property Mall

http://www.ipmall.fplc.edu

Indiana University-Purdue University Indianapolis: Copyright Management Center

http://www.iupui.edu/it/copyinfo

International Federation of Library Associations and Institutions (IFLA): Position Paper on Copyright in the Electronic Environment

http://www.ifla.org/V/ebpb/copy.htm

Manning and Napier Information Services: IpFrontline (Recent News, Trends, Technologies, and Legislation)

http://www.ip.com/ipFrontline/

Special Libraries Association (SLA): Selected References on Copyright and Special Libraries

http://www.sla.org/membership/irc/copyright.html

Stanford University Libraries: Copyright and Fair Use

http://fairuse.stanford.edu

University of Texas

http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm

U.S. Copyright Office

http://lcweb.loc.gov/copyright

U.S. House of Representatives Internet Law Library/Intellectual Property: Copyrights

http://law.house.gov/325.htm

World Intellectual Property Organization (WIPO)

http://www.wipo.org

[Top]

Guidelines

American Library Association: Model Policy Concerning College and University Photocopying

Gopher://ala1.ala.org:70/00/alagophix/50403001.document

Classroom Photocopying, Music, Off-Air Recording

http://www.musiclibraryassoc.org/Copyright/

Classroom Use of Videotapes and Computers Software

http://www.ifla.org/documents/infopol/copyright/ala-1.txt

Ethical and Legal Use of Software

http://www.ifla.org/documents/infopol/copyright/educom.txt

Fair Use Guidelines for Educational Multimedia

http://www.libraries.psu.edu/avs/fairuse/guidelinedoc.html

Fair-Use Guidelines for Electronic Reserve Systems

http://www.cc.columbia.edu/~rosedale/guidelines.html

UCLA: Library Copyright Policy

http://www2.library.ucla.edu/copyright/toc.htm

[Top]

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